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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 764

L. I. COMBS & SONS, INC., L. I. COMBS, JR., and VILLAGE SHOPPING CENTER, INC., an Indiana Corporation,

Petitioners,

v.

PAUL M. SCHREIBMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTION.

As stated in the Petition, jurisdiction of this Court is being invoked under Title 28 U.S. Code, Section 1254 (1). However, respondent respectfully submits that Rule 19 of the Supreme Court Rules is pertinent on the question

of the jurisdiction of this Honorable Court in the case at bar. Under Rule 19, the Petition, of necessity, is based on the ground that the United States Court of Appeals for the Seventh Circuit has "decided an important state • • • question in a way in conflict with applicable state • • • law."

QUESTION PRESENTED.

Whether this Court will issue a writ of certiorari to a Circuit Court of Appeals to review that Court's interpretation of one section of the Indiana Real Estate Licensing Act, which section has never been construed by the Indiana state courts, and where, therefore, both the District Court and the Circuit Court had to surmise what construction the Indiana state courts would place upon it?

STATEMENT OF FACTS.

In April of 1959, the respondent (plaintiff below) was contacted by one of the petitioners, L. I. Combs, Jr., in connection with his serving as a real estate broker for the sale of the Village Shopping Center which is located in Gary, Indiana. (App. 28) By a letter dated April 3, 1959, the respondent replied to the letter of Mr. Combs, expressing his interest in acting as a broker for the sale of the shopping center. (App. 28) After an exchange of correspondence and a personal meeting of the respondent and the petitioner Combs, it became apparent that Mr. Schreibman would be engaged as the broker in the proposed sale of the shopping center. (App. 27-28) Therefore, on July 7, 1959, the respondent requested an application for an Indiana real estate broker's license from the Board of Real Estate Commissioners in Indianapolis, Indiana. (App. 27)

Under rules and regulations of the Board of Real Estate Commissioners, it was not necessary for the respondent to take a broker's examination in order to obtain an Indiana license, as he was able to apply for a reciprocal license since he was a licensed broker in the State of New York. It was only necessary that he pay the necessary fees, which he did. (App. 27) On July 8, 1959, a listing agreement was duly executed by the petitioner, L. I. Combs, Jr., as president of the petitioner Village Shopping Center, Inc., and the respondent. The listing agreement gave Mr. Schreibman exclusive authority to negotiate the sale of the Village Shopping Center. (App. 30) Meanwhile, the respondent's application for an Indiana license was submitted to the Board of Real Estate Commissioners at its July 29th meeting, at which time it was recommended that a reciprocal license be issued. (App. 27) The re-

spondent actually received his Indiana license on August 10, 1959, when he received a letter from the Indiana Board of Real Estate Commissioners which stated:

> "Your application for broker's license by reciprocal city was presented at the July 29 meeting of the Commission, and it is the recommendation of the Commission that this reciprocal license be issued." (App. 27, Tr. 107)

On July 8th, respondent brought with him to Gary a prospective purchaser, Elmer Babin, who was favorably impressed with the shopping center and who offered to purchase the center for the listed price. (App. 30-31) Documents incorporating the terms agreed upon were prepared by Mr. Babin, an attorney, and on August 4, 1959, they were presented to the sellers' attorney. (App. 68)

A number of changes and revisions were agreed upon and Mr. Babin amended the documents accordingly. They were sent to Mr. Combs and his attorney on August 6th (App. 68-71). On August 19th, Mr. Babin received a letter from Mr. Combs stating that the sellers did not want to sell at that time. Mr. Babin then "closed" his file on the matter. (App. 72)

Respondent, however, continued his efforts to bring about a sale. (App. 38-39) In March, 1960, Mr. Babin submitted another offer on different prices and terms and again these terms were agreed upon and Mr. Babin prepared the documents. A closing date was set for April 12, 1960, but the sellers again refused to complete the sale. (App. 40-4)

Thereafter, plaintiff filed this suit to recover his broker's commission. The District Court entered judgment for the defendants (petitioners here) at the close of the plaintiff's evidence and the Circuit Court of Appeals for the Seventh Circuit reversed and remanded for further proceedings.

ARGUMENT.

I.

UNDER POINT ONE OF THEIR ARGUMENT, PETITIONERS FAIL TO POINT OUT WHERE THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH INDIANA LAW.

The decision of the United States Court of Appeals for the Seventh Circuit, as well as the decision of the District Court, was based solely upon the construction of one section of the Indiana Real Estate Licensing Act, namely Burns' § 63-2408, which reads as follows:

> "In all actions for the collection of a commission or other compensation for the sale of real estate and filed in the courts of this state after October 1, 1949, it shall be alleged and proved therein that at the time the cause of action arose the party seeking relief was a duly licensed real estate broker or real estate salesman of the State of Indiana."

The District Court construed the statutory language "at the time the cause of action arose" as requiring a person suing for a real estate commission to allege and prove that he was duly licensed as a broker before even entering into a listing contract. The Circuit Court of Appeals construed Burns' § 63-2408 as only requiring a party to allege and prove that he was duly licensed "at the time his cause of action arose," hence, reading the latter phrase in its ordinary legal sense. In so construing Burns' § 63-2408, the Seventh Circuit found it necessary to remand the case for further proceedings in the District Court. The Seventh Circuit stated:

"We hold that the fact that plaintiff was not licensed on July 8, 1959, when the listing contract was entered into, does not itself render that contract void and does not preclude recovery.

The district court should have determined, under the listing contract, what plaintiff had to do to earn his commission, and further should have decided if and when plaintiff's cause of action for recovery of the commission "arose" under § 63-2408.

For the reasons given, the judgment is reversed and the cause remanded for further proceedings consistent with the views expressed." (App. B, p. 31 of Petition)

The significant factor in each of the decisions and opinions below is that neither court based its decision upon an Indiana decision construing this particular section of the licensing act. The District Court, during the course of its opinion, conceded the fact that there was no Indiana case construing this pertinent language. The Court stated:

"Unfortunately, this is a case of first impression in Indiana. There is no Indiana law on it; but there are cases from other States on this precise subject—some in favor of the plaintiff's position, some in favor of the defendants' position. It puts this Court in the position of trying to guess, if it can, what the Supreme Court would decide in this situation." (App. A, p. 15 of Petition)

Again, the District Court stated:

"Since I have come to that conclusion and feel this is the better reasoning, and since we have no guidelines, of Indiana, of course, it follows that I must grant the motion. I may be wrong, and I invite the plaintiff to test my decision. I really would like to know. I do not know how the Seventh Circuit would rule on this." (App. A, pp. 20-21 of Petition)

The Circuit Court of Appeals, likewise, recognized the lack of Indiana authority when Judge Kiley stated in his opening sentence that the present appeal was one of "first impression". (App. B, p. 25 of Petition)

It is respectfully submitted that the petitioners, themselves, concede this significant fact by the nature of their argument under what has been designated as Point 1 in the argument section of their Petition. It is to be noted that the authorities cited by the petitioners to support their proferred construction of Burns' § 63-2408 are decisions arising in other states. Not one Indiana decision is cited in support of the construction proferred by the petitioners and followed by the District Court below.

Petitioners rely primarily upon *Hunter* v. *Cunning* (1944) 176 Ore. 250, 154 P. 2d 562 and *Irons Investment Co.* v. *Richardson* (1935) 184 Wash. 118, 50 P. 2d 42. A reading of the District Court's opinion clearly indicates that the lower court was relying primarily upon these decisions in rendering its interpretation of the pertinent section of the Indiana Real Estate Licensing Act. As pointed out in the opinion of the Circuit Court of Appeals, these cases do offer some support, by way of dictum, to the petitioners' petition. However, the Circuit Court of Appeals believed that the better-reasoned construction of the licensing act was expressed by other foreign decisions. Notably is the case of *Pierce* v. *Isabel* (1941) 70 Ohio App. 385, 40 N.E. 2d 481. (See other cases cited in Appellant's Brief.)

Therefore, it is respectfully submitted that petitioners fail completely Under Point 1 to point out to this Honorable Court where the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with Indiana law.

II.

UNDER POINT TWO OF THEIR ARGUMENT, PETITIONERS FAIL TO POINT OUT WHERE THE DECISION OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE INDIANA LAW.

Under what they designate as Point 2 of their argument, petitioners assert that the Court of Appeals, by its decision, has ignored numerous decisions in Indiana holding that a contract made in violation of a statute is void.[1] In support of this assertion, the petitioners cite five Indiana cases.

Yet it is respectfully submitted that the principle of law enunciated by these cases is not applicable to the case at bar. For in each of the licensing acts in question in the cases cited by the petitioners, the legislature had failed to expressly provide the time at which a license was necessary in order to enforce a contract for compensation. Therefore, it was not illogical for the Indiana courts, in these cases, to hold that a contract entered into before the acquiring of a license was void. But the Indiana Real Estate Licensing Act, unlike the licensing statutes involved in the cases relied upon by the petitioners, contains an express provision which states the time at which a broker's license is necessary if the person acting as a broker is to have a legal right to claim compensation for his services. This express provision is Burns' § 63-2408, *supra*. Hence, the Circuit Court of Appeals correctly stated:

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[1] It is to be noted that the Indiana Real Estate Licensing Act (being Burns' § 63-2409) does not require a license prior to the execution of a listing contract; therefore, petitioner's premise is, in fact, invalid.

> "While, as the District Court stated, it may be true as a general proposition of Indiana law that a person should not be permitted to profit for his own illegal acts, we are here concerned with a particular statute and the plaintiff's right of recovery must be judged under that statute." (App. B, p. 27 of Petition)

Therefore, it is obvious that the proposition of law for which these cases stand is not applicable to the case at bar and, hence, that petitioners have failed to demonstrate to this Honorable Court the soundness of their assertion that the Court of Appeals' decision has changed a concept of law established by the Indiana Appellate Courts.

III.

UNDER POINT THREE OF THEIR ARGUMENT, PETITIONERS ONCE AGAIN FAIL TO POINT OUT WHERE THE DECISION OF THE UNITED STATES COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE INDIANA LAW.

Being unable to cite to this Honorable Court any Indiana decision interpreting Burns' § 63-2408 under Point 1 of their argument, petitioners attempt under Point 3 to furnish Indiana authorities to support their assertion that the decision of the Seventh Circuit is "contrary to the decisions and laws of the State of Indiana." (Petition, p. 11)

It is respectfully submitted that the Indiana decisions cited by the petitioners, like the cases cited under their Point 2, are simply not applicable to the issue faced by the lower courts. Although both cases were cited to the District Court by the petitioners (defendants below), that court did not rely upon either authority in reaching its decision in favor of the petitioners. Indeed, the District Court believed that neither case was pertinent in deciding

the issue before it, since the Court stated in the course of its opinion that "this is a case of first impression in Indiana; [t]here is no Indiana law on it." (App. A, p. 15 of Petition) The Circuit Court of Appeals expressly noted the irrelevancy of both of these cases during the course of its opinion:

> "Defendants in the case before us rely upon *Folsom* v. *Callen*, 126 Ind. App. 201, 131 N.E. 2d 328 (1956), and *McKenna* v. *Turpin*, 128 Ind. App. 636, 151 N.E. 2d 303 (1958). In *Folsom* the court held that one who had never been licensed could not recover a commission. And in *McKenna* the court's dictum was that defendant was justified in rescinding the listing contract because the broker had allowed the license to lapse. The holdings in those cases are not pertinent to our decision." (App. B, p. 30 of Petition)

Finally, petitioners attempt to construct some sort of an argument based upon other sections of the Indiana Real Estate Licensing Act. It is respectfully submitted that petitioners fail to demonstrate that these licensing statutes support only one reasonable construction of Burns' § 63-2408, or, namely, the construction placed upon this section by the District Court. On the contrary, the opinion of the Seventh Circuit clearly reveals that its consruction of Burns' § 63-2408 is supported by these very same sections of the licensing statute. As stated by the Appeals Court:

> "We think that this interpretation of the word 'arose' signifies the substantive character of § 63-2408 conferring on brokers, having an Indiana license when their cause of action arose, a right of recovery. *This view is supported by the provisions of Indiana's § 63-2407.* Under this section each act is regarded as a separate criminal offense, punishable by a fine 'to which shall be added the amount of any real estate

> commission paid or earned on such violation * * *.' The only situation in which the forfeiture provision would be applicable would be where the broker has completed every act required to give him a right to his commission, *i.e.*, where his cause of action has arisen. At any earlier time no commission would have been 'paid or earned.'" (App. B, p. 29 of Petition; emphasis added.)

Therefore, once again, petitioners have failed to demonstrate to this Honorable Court where the decision of the Circuit Court of Appeals is in conflict with applicable decisions or statutes of the State of Indiana.

CONCLUSION.

A mere reading of the opinions of the District Court and the United States Court of Appeals for the Seventh Circuit reveals that both courts were cognizant of the fact that there was no Indiana decision on the precise question before both Courts. Again, it is obvious from a mere reading of the opinions that both Courts merely construed one section of the Indiana Real Estate Licensing Act, relying in each instance upon foreign authority to support their decisions. As such, it is clear that the decision rendered by the United States Court of Appeals for the Seventh Circuit is not in conflict with any applicable Indiana law.

This being the case, petitioners were unable to demonstrate in the course of their Petition just where the decision of the Court of Appeals conflicted with Indiana law. Therefore, under Rule 19 of this Honorable Court,

it is respectfully submitted that the petitioners have failed to demonstrate "special and important reasons" for the granting of their petition for a writ of certiorari.

Wherefore, Respondent respectfully prays that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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RICHARD P. KOMYATTE,
Counsel for Respondent.